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10 UNITED STATES DISTRICT COURT
11 FOR NORTHERN DISTRICT OF CALIFORNIA

12
13 DEMAS YAN,
14 Appellant,
15 vs.
16 TONY FU et al.,
17 Appellees.

18 **Case No.: 3:11-CV-01814-RS**

19 DEMAS YAN'S SUPPLEMENTAL
20 RESPONSE TO ORDER TO SHOW CAUSE

21 Date: October 27, 2017
22 Time: 11:00 am
23 Dept. F
24 Magistrate Judge: Jacqueline Corley

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26 Appellant DEMAS YAN (Yan) hereby files this supplement response to the Order to Show
27 Cause.
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29
30 RELEVANT BACKGROUND

31 Creditor Crystal Lei (Lei) did not subpoena Yan's personal tax returns for the debtor exam. But
32 dispute the fact that Lei did not subpoena tax returns, at the August 10, 2017 hearing, Lei,
33 through her attorney Mark Serlin, represented, or more accurately, misrepresented to the Court
34 that Yan intentionally failed to produce tax returns at his exam. The Court ordered Yan to
35 produce tax returns along with other categories of documents by August 31, 2017. (Dkt. no.
36 60.) Yan timely complied and produced via email all available documents other than privileged
37 documents on August 31, 2017. Yan explained in that email the reasons for asserting certain
38 privilege as to certain categories of documents including tax returns.

39
40 The Court, at Lei's request, issued an Order to Show Cause ("OSC", Dkt. no. 64). OSC was
41 issued by the Court purportedly on Lei's representation to the Court that "Mr. Yan has yet to
42 produce financial documents." At the hearing on October 27, 2017, the Court's statements made

on the record indicate that Lei had not truthfully inform the Court that Yan had produced financial documents on August 31, 2017.

OSC WAS DEFECTIVE. DEFECT IS NOT WAIVED BY YAN'S RESPONSES TO OSC.

To the extent that the OSC was issued based on Lei's misrepresentation that Yan has not produced documents by August 31, 2017, the OSC was issued on false premises and is defective per se. To the extent that the OSC did not specifically order Yan to explain why he should not be held in contempt for asserting certain privileges, Yan cannot and should not be held in contempt for so asserting privileges without prior notice by the Court that certain privileges are not available to him even if the Court so determines. By his responses to the OSC, Yan is not waiving the OSC's defects as stated above.

NO WAIVER OF FIFTH AMENDMENT PRIVILEGE

It is settled law that the Fifth Amendment privilege against self-incrimination may be raised in civil and criminal proceedings. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977). The privilege may be raised at any time. A civil litigant can refuse to testify whenever he could fairly claim that to answer might tend to incriminate him. Arndstein v. McCarthy, 254 U.S. 71, 71 (1920). “An ordinary witness may pick the point beyond which he will not go, and refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating.” In re Master Key Litig., 507 F.2d 292, 294 (9th Cir. 1974).

At the hearing on October 27, 2017, Lei argued that Yan had waived the privilege by not raising objection to the subpoena, but the subpoena did not demand for production of tax returns therefore there was no reason for Yan to assert the privilege. Yan did not waive the privilege and had timely asserted it. Waiver of the Fifth Amendment privilege is strongly disfavored and “should be inferred only in the most compelling of circumstances.” Klein v. Harris, 667 F.2d 274, 288 (2d Cir. 1981). “Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.” Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(internal quotation marks omitted). Waiver of the Fifth Amendment privilege at one state of a proceeding

1 is not a waiver of that right for other stages." United States v. TrejoZambrano, 582 F.2d 460, 464
2 (9th Cir.1978).

3

4 ACT OF PRODUCING DOCUMENTS HAS COMMUNICATIVE ASPECTS AND IS
5 PRIVILEGED UNDER THE FIFTH AMENDMENT

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7 The Fifth Amendment Privilege may be asserted against compelled production of documents.
8 As frame by the United States Supreme Court in United States v. Doe 465 U.S. 605 (1984), the
9 relevant inquiry is whether the act of producing documents has communicative aspects which
10 warrant Fifth Amendment protection. The Court found that the act of producing documents does
11 have communicative aspects. The act of production is privileged because it would compel
12 respondent to "admit that the records exist, that they are in his possession, and that they are
13 authentic." Id. at 612-614. The court also stated that the privilege applies equally to tax
14 records. Ibid. Also there is no tax-exception to the privilege. The Fifth Amendment applies in
15 all instances where a taxpayer has reasonable cause to apprehend criminal prosecution, whether
16 tax related or not. See United States v. Troescher, 99 F.3d 933 (9th Cir. 1996).

17 YAN HAS REASONABLE BASIS TO ASSERT PRIVILEGE

18

19 "The right to assert one's privilege against self-incrimination does not depend upon the
20 likelihood, but upon the possibility of prosecution." In re Master Key Litig., 507 F.2d 292, 293
21 (9th Cir. 1974) (citing Hoffman v. United States, 341 U.S. 479, 486-87 (1951)). There is no
22 requirement that a criminal action be ongoing, and in fact, one may assert the privilege against
23 self-incrimination even when "the federal government and the states do not appear particularly
24 interested in bringing criminal actions." Master Key, 507 F.2d at 293. "[W]hen a witness can
25 demonstrate a fear of prosecution, which is more than fanciful or merely speculative, he has a
26 claim of privilege that meets constitutional muster." In re Grand Jury Proceedings: Samuelson,
27 763 F.2d 321, 324 (8th Cir. 1985). The Fifth-Amendment privilege "not only extends to
28 answers that would in themselves support a conviction...but likewise embraces those which

1 would furnish a link in the chain of evidence needed to prosecute the claimant." Hoffman, 341
2 U.S. at 486. The privilege may be raised by an innocent person fearing ensnarement into
3 criminal investigations. In 2001, the U.S. Supreme Court unanimously held that "one of the
4 Fifth Amendment's basic functions ... is to protect innocent men ... who otherwise might be
5 ensnared by ambiguous circumstances." Ohio v. Reiner, 532 U.S. 17, 21 (2001) (internal
6 quotation marks omitted). For the privilege to apply, it is enough if the responses would
7 "merely 'provide a lead or clue' to evidence having a tendency to incriminate." United States v.
8 Neff, 615 F.2d 1235, 1239 (9th Cir.) (quoting Hashagen v. United States, 283 F.2d 345, 348 (9th
9 Cir. 1960)), cert. denied, 447 U.S. 925 (1980)).

10
11 It is not necessary for the person asserting the privilege to establish the precise manner in which
12 he will incriminate himself by responding. This would make the privilege useless. As the
13 Supreme Court said in Hoffman v. United States, 341 U.S. 479, 486-87, "To sustain the
14 privilege, it need only be evident from the implications of the question, in the setting in which it
15 is asked, that a responsive answer to the question or an explanation of why it cannot be answered
16 might be dangerous because injurious disclosure could result." The trial court must make this
17 determination from the facts as well as from "his personal perception of the peculiarities of the
18 case." Id. at 487. If the court decides that no threat of self-incrimination is evident, the person
19 asserting the privilege then bears the burden of showing the danger of incrimination. United
20 States v. Neff, 615 F.2d 1235, 1240 (9th Cir.).

21
22 Here, it is not difficult to imagine Yan's fear of possible ensnarement into investigations or
23 prosecution. But if the court decides that no threat of self-incrimination is evident, Yan is
24 willing and would testify in-camera.

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26 Date: 11/1/2017
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28 Respectfully Submitted,

/s/Demas Yan